No. 02-959

Supreme Court, U.S.
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In The
Supreme Court of the United States

TAMARA WATSON,

Petitioner,

v.

LITHONIA LIGHTING, D/B/A HI-TEK GROUP, A WHOLLY OWNED SUBSIDIARY OF NATIONAL SERVICE INDUSTRIES, INC., AND NATIONAL SERVICE INDUSTRIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly affirm summary judgment against the plaintiff on her claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, when the court of appeals determined plaintiff was unable to perform the *sine qua non* of a manufacturing operator ("MO") position – job rotation?

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent, Lithonia Lighting, a division of Acuity Lighting Group, Inc., is a wholly owned subsidiary of Acuity Brands, Inc. Respondent, Lithonia Lighting, no longer uses the d/b/a of Hi-Tek Group. Respondent, National Service Industries, Inc., no longer holds any ownership interest in Lithonia Lighting.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

I. Reasons for Denying the Writ 1

A. The decision below should stand as the Petitioner failed to meet her burden of production to survive summary judgment ... 1

B. The decision below is not in conflict with the decisions of other circuits or the EEOC regulations 4

C. Petitioner overstates the implications of the decision below 8

II. Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001).....7, 8

Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995).....6, 7

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)..... 1

Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999).....1, 3

Emerson v. N. States Power Co., 256 F.3d 506 (7th Cir. 2001).....7, 8

Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988)..... 7

Hansen v. Henderson, 233 F.3d 521 (7th Cir. 2000)..... 4

Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001)..... 5

Mays v. Principi, 301 F.3d 866 (7th Cir. 2002)..... 4

Morton v. United Parcel Serv., Inc., 272 F.3d 1249 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1910 (2002)..... 5

Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001)..... 6

Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002)..... 4

Watson v. Lithonia Lighting, 304 F.3d 749 (7th Cir. 2002).....3, 4

Watson v. Lithonia Lighting, No. IP00-1744-C-M/S, 2002 U.S. Dist. LEXIS 4361 (S.D. Ind. Jan. 14, 2002).....3, 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

29 C.F.R. § 1630.2(n) 7

42 U.S.C. § 12111(8) 1

Fed. R. Civ. P. 56(e) 4

OTHER AUTHORITIES

Americans with Disabilities: Practice and Compliance Manual § 7:42 (George L. Bounds et al. eds., 1995) 6

I. REASONS FOR DENYING THE WRIT

A. The decision below should stand as the Petitioner failed to meet her burden of production to survive summary judgment.

The Petitioner is attempting to create an issue for *certiorari* that was not before the Seventh Circuit. The issue before the Seventh Circuit was simply whether the Petitioner had presented sufficient evidence to the district court to survive summary judgment.

Summary judgment for a defendant is appropriate when the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" – that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. *Cleveland*, 526 U.S. at 806 (quoting 42 U.S.C. § 12111(8)).

As highlighted by the district court, Watson admitted an inability to show herself able to perform the essential functions of her MO position; the Seventh Circuit properly affirmed summary judgment on that basis:

> **Q:** Okay. You said there were various stations and you've described those for the Line 8 assembly function. Would you move from station to station as an MO at Lithonia Lighting?
>
> **A:** Yes.
>
> **THE WITNESS:** On Line 8?

MR. MASUR: Yes.

A: (Continuing) Yes, we would rotate.

Q: How often would you rotate from station to station?

A: I think it was like three to four times a day.

Q: So approximately how many hours would you – Would it be fair to say that you worked approximately two to three hours at any given station when you were building light fixtures?

A: Between one and three, I'd say.

Q: And while you were working at a specific station would you repetitively perform the functions of that station over and over?

A: Yes.

Q: You also mentioned that you might move from line to line. Could you describe to me when that might happen and how that might happen?

A: If you were low on work, you would be moved. If they needed help on another line, you'd be moved.

Q: When you say you would be moved, what kind of job duties would you be moved to or where would you go to? Can you give me an example?

A: You would go all over the plant. You could go to different lines. They could send you to relocks.

THE WITNESS: You're talking prior to the injury, right?

MR. MASUR: Prior to the injury, right.

> **A:** (Continuing) You'd just go to different lines and sometimes go to relocks. I know there was like 42 and Line 25 and 23 and just I don't know how many lines are out there. There is a lot.
>
> **Q:** And did that happen frequently that you'd be moved from line to line while you were working at Lithonia Lighting prior to your injuries?
>
> **A:** You might be moved a couple times a week. Sometimes you might not be moved at all.
>
> **Q:** And that happened to you personally, right? You would personally be moved?
>
> **A:** It was normal, yes.

Pet. App. 15a-16a; *Watson v. Lithonia Lighting*, No. IP00-1744-C-M/S, 2002 U.S. Dist. LEXIS 4361, at *16-17 (S.D. Ind. Jan. 14, 2002).

The only evidence that Watson provided in her effort to avert summary judgment was a conclusory and obtuse affidavit that contradicted her earlier testimony, which in turn affirmed that rotation is Lithonia's norm and serves a business purpose. Those admissions are memorialized in excerpts of her August 2001 deposition testimony, which were offered to the trial court. Pet. App. 15a-16a; *see supra*, at 1-2. A party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting her own previously sworn statement, without explaining the contradiction or attempting to resolve the disparity. *Cleveland*, 526 U.S. at 806-07. Moreover, in addition to being conclusory, obtuse, and contradictory to her prior sworn testimony, the affidavit was defective in that Watson did not affirmatively show that she is competent to testify to the matters stated therein, as astutely noted by the court of appeals. Pet. App. 3a; *Watson v.*

Lithonia Lighting, 304 F.3d 749, 751-52 (7th Cir. 2002) (citing Fed. R. Civ. P. 56(e)).

Accordingly, after recognizing that Lithonia's evidence was uncontested, the Seventh Circuit found that Watson had shown herself unable to avail herself of the rights and remedies embodied in the ADA. Pet. App. 3a; *Watson*, 304 F.3d at 752. Additionally, the court of appeals noted the soundness of the district court's ruling given the doubtful proposition that Watson is "disabled" as defined by the ADA,[1] *see Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), and that what Watson was asking of Lithonia, essentially, to create a new position tailored to her abilities, is not a "reasonable" accommodation. *See, e.g.*, *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002); *Hansen v. Henderson*, 233 F.3d 521, 523-24 (7th Cir. 2000)

B. The decision below is not in conflict with the decisions of other circuits or the EEOC regulations.

Watson contends that the decision below is in conflict with the decisions of other circuits – specifically, those of the Third, Sixth, Eighth, and Ninth Circuits – and the EEOC regulations. This, however, is not accurate.

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[1] Neither the district court nor the court of appeals reached the issue of whether Watson's physiological deficiencies constitute a disability under the ADA because the case was so easily decided on other grounds. Pet. App. 2a, 12a; *Watson*, 304 F.3d at 750; *Watson v. Lithonia Lighting*, No. IP00-1744-C-M/S, 2002 U.S. Dist. LEXIS 4361, at *10 (S.D. Ind. Jan. 14, 2002).

As explained more fully in the previous section, the court of appeals based its holding on the Petitioner's admissions and her complete failure to adduce evidence sufficient to survive summary judgment, not some *per se* rule as Petitioner contends. Pet. 15. For that reason, the decisions to which the Petitioner directs this Court's attention as justification for *certiorari* are easily distinguishable.

The first case to which Petitioner directs the Court's attention is *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1910 (2002). *Morton* is a case centered around whether a plaintiff could perform discrete functions of a single position. In *Morton*, the plaintiff offered evidence to refute that the ability to drive Department of Transportation-licensed ("DOT") vehicles was an essential function of a package car driver position. Specifically, she provided evidence that swing drivers performed their duties using non-DOT vehicles and/or performed non-driving warehouse work when there was insufficient driving work. Here, Petitioner fails to adduce evidence that rotation is not an essential function of the MO position. To the contrary, Petitioner testified she was regularly required to perform a wide array of duties and that it was a "normal" part of her MO position to be rotated among the various lines and stations. *See supra*, at 1-3.

Next, Petitioner cites *Kiphart v. Saturn Corp.*, 251 F.3d 573 (6th Cir. 2001), which involved a question of whether being fully functional/fully rotational was an essential job function of working at the employer's plant. In *Kiphart*, the court determined that there was a question of material fact regarding whether being fully rotational was an essential function of the job where

essentially no one was required to rotate, much less the plaintiff. To the contrary, here, Petitioner affirmed she was required to rotate and provided no other evidence to dispute that rotation, indeed, was an essential function of the MO position.

The Petitioner also cites *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 282 (3d Cir. 2001), as conflicting authority. In *Skerski*, the plaintiff adduced evidence that he did not climb poles, a function which the employer alleged was essential to his position as an installer technician, for a continuous period of over three years, in addition to the fact that his assignments were distributed at a supervisor's discretion. Based on the requirements of her employer's business, for any day in question, Petitioner admits employees, including herself, would regularly rotate to various lines and stations and that her repetitive activity restrictions ebbed and flowed. Unlike Skerski, who went over three years without performing a function his employer alleged to be essential, Petitioner was only intermittently restricted from rotating, an essential function of the MO position. Moreover, a supervisory change in *Skerski* seemed to prompt plaintiff's discharge. Here, it was the nature and quality of Petitioner's previous work restrictions that compelled Lithonia to release Petitioner, as she was no longer permitted to perform any repetitive functions, thereby precluding rotation.

Finally, Petitioner cites *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995). The *Benson* court noted, "Inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential." *Id.* at 1113 (quoting Americans with Disabilities: Practice and Compliance

Manual § 7:42 (George L. Bounds et al. eds., 1995)). Moreover, the *Benson* court acknowledged that essential job functions "should reflect the actual functioning and circumstances of the particular enterprise involved." *Id.* at 1114 (quoting *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988)). Here, Petitioner admitted that rotation was required by her employer and that she had actually been required to rotate, thereby making rotation an essential function for the MO position under the tests set forth in *Benson*. This stands in stark contrast to *Benson*, where the essential functions of the position at issue were unknown to the court.

Furthermore, the decision below does not conflict with the EEOC regulations. Petitioner argues, "the court of appeals neither mentioned nor applied the EEOC regulations." Pet. 24. Admittedly, the EEOC regulations can be helpful in guiding a court's analysis of the "essential functions" issue when the parties properly place that issue in dispute. *See* 29 C.F.R. § 1630.2(n) (delineating factors to be considered when conducting an essential functions analysis). In the case below, however, Watson unequivocally admitted that rotation among positions was an essential function of the position Watson held. Consequently, there was no need for the court of appeals to apply the EEOC regulations to reach its decision.[2]

[2] Respondents direct this Court's attention to *Basith v. Cook County*, 241 F.3d 919, 927 (7th Cir. 2001) and *Emerson v. N. States Power Co.*, 256 F.3d 506, 512 (7th Cir. 2001), which demonstrate that the Seventh Circuit is not a stranger to applying the EEOC regulations when the evidence before it requires a full blown analysis of essential functions. There is no indication in the *Watson* decision that the

(Continued on following page)

In the absence of any conflict between the decision of the court of appeals in this case and the decisions of other courts of appeals or the EEOC regulations, Respondent respectfully submits that this case does not fall within the purview of Supreme Court Rule 10. Therefore, a grant of *certiorari* would be inappropriate.

C. Petitioner overstates the implications of the decision below.

Petitioner exaggerates the scope of the Seventh Circuit's decision. Petitioner incredulously contends that the decision of the court of appeals, "if allowed to stand, will create a loophole so large that almost any employer . . . will be able to insulate itself from the requirements of the ADA." Pet. 3. Petitioner overstates the implications of the Seventh Circuit's holding. The decision below is extremely limited in that it is based on Petitioner's concession of her inability to show herself qualified, and would be readily distinguishable from subsequent cases where such an admission is not made.

Petitioner's characterization of the *Watson* holding as the Seventh Circuit yielding its adjudicatory functions to the whims of an employer under the guise of an "essential functions" analysis misses the mark. The decision below is not meant to be the Seventh Circuit's sole pronouncement on "essential functions" analysis. *Supra*, at n.2. Rather, the decision below simply recognizes Petitioner's failure to meet her burden of production.

Seventh Circuit intended to abandon the type of essential functions analysis employed in *Basith* and *Emerson*.

II. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for *Certiorari* be denied.

Respectfully submitted,

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